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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 189

ALVIN A. JACOBSEN, Administrator of the Estate of Alan A. Jacobsen, Deceased,

Petitioner,

vs.

INTERNATIONAL TRANSPORT, INC., E. E. WOLF, ALLIS-CHALMERS MFG. CO. and JACK M. BROWN, a/k/a JACK M. BROWN, SR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 19, 1968. The Court of Appeals affirmed the District Court's judgment of dismissal, based upon a jury verdict, of Petitioner's suit for damages against Respondents.

OPINIONS BELOW.

The United States District Court for the Southern District of Iowa did not render an opinion on this case. The Opinion of the Court of Appeals for the Eighth Circuit (Appendix, *infra* pp. 1a-9a) has not been reported at the time of the printing of this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on March 19, 1968, and a copy thereof is appended to this Petition (Appendix, *infra* p. 10a). The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

The Questions Presented are:

1. Where no emergency exists and no destruction of evidence can be involved, and where no arrest has been made nor can be made, is a search and seizure under the Fourth Amendment nonetheless reasonable without a search warrant?

2. Where the Iowa Implied Consent Law requires the written request of a peace officer to be made before a blood sample can be withdrawn for the purpose of determining the alcoholic content thereof, may a third person who is not a peace officer, and without any request from a peace officer, written or oral, take a blood sample for reasons of his own and without a search warrant?

3. Where the Iowa Implied Consent Law protects a blood sample from becoming contaminated from the introduction of outside filth by requiring the use only of new, originally factory wrapped, disposable syringes and needles, kept under strictly sanitary and sterile conditions in drawing blood from the body of an individual, may a blood sample be taken with a dirty, non-sterile, contaminated needle without shocking the conscience and sensibilities of society and without materially deviating from the essence of the stated mandate of the Iowa Implied Consent Law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourth Amendment, and the first section (Due Process Clause) of the Fourteenth Amendment, to the Constitution of the United States; together with sections 321B.2, through 321B.5 inclusive, Volume I, pages 1238 and 1239, being parts of the Iowa Implied Consent Law; and sections 339.5, 339.6, and 339.9 of the 1966 Code of Iowa, Volume I, page 1326, and section 321.271 of the 1966 Iowa Code, page 1195, are set forth in the Appendix, *infra* p. 11a *et seq.*

STATEMENT OF THE CASE.

The Petitioner-Administrator brought his action for damages against Respondents, the operators and owners of a tractor-trailer, all of whom were domiciled in states other than Iowa (R. 1, 7 & 8), for the wrongful death of his son in a collision occurring when Respondents' truck pulled onto a through highway in front of the automobile which Petitioner's son was driving. The basic facts, which are not in dispute, are as follows:

Plaintiff's decedent, his son, was 29 years old, unmarried, and had been regularly and gainfully employed by one employer since his honorable discharge from active duty in the Korean war so that the damages to his estate resulting from his untimely demise were far in excess of the jurisdictional amount required to bring this action (R. 29). On the night he was killed he was driving his Mustang automobile from Davenport, the City in which he worked, to his home in Walcott, Iowa, where both petitioner and his decedent were domiciled (R. 31). Walcott is about 12 miles Westerly of Davenport. Plaintiff's decedent was driving along U. S. Highway No. 6 which was a through highway. Respondent's truck had stopped at the Stop sign at highway 6 (R. 58 & 59) and then pulled out in front of petitioner's decedent (R. 89, last 3 lines).

Police (Peace) officers investigated the accident and were present at the scene of the accident when the deceased was still in his auto prior to being taken to the hospital (R. 37). Decedent was not arrested but was dead by the time he was examined (R. 24).

The County Medical Examiner, a licensed M.D., saw the deceased at the hospital for the first time (R. 24). He had already been advised as to the manner of death and an external examination clearly revealed the cause of death (R. 25). He performed no autopsy because no autopsy was necessary (R. 24).

Acting entirely outside the scope of his statutory duties as a County Medical Examiner and for reasons entirely extraneous to any determination of the cause and manner of death, and without any search warrant being obtained or involved, the Examiner, at his own instance (R. 25, l. 9), withdrew a sample of blood from the person of the petitioner's decedent. No peace officer nor anyone else requested him to do this in writing, or orally, or at all (R. 25, ll. 8-13).

The Examiner believes the needle which he used to take the blood sample was one which he took out of his medical kit: That he had used it previously for the same purpose and had then rinsed it in cold, running water without sterilizing it and put it back in his medical kit which was never sterilized. No factory wrappings could be removed from the needle because the needle had been used before (R. 25, ll. 1-7).

A laboratory chemist ran a test on the blood sample and his findings were that there were 344 milligrams of alcohol per one hundred cc's of blood (R. 69).

Respondents' pathologist testified that a driver of a car who had a blood test of 344 would be weaving around the road as he drove because muscle response "would be very seriously impaired", so if a person were driving a car it would be weaving around as he drove. He might momentarily go straight, but by and large he would be weaving around (R. 82). This would be true of all peo-

ple who had this amount or percent of alcohol (344 mg of alcohol per 100 cc's of blood) in his blood (R. 82, last sentence).

The respondent truck driver, however, testified that petitioner's decedent was driving at all times on his own side of the road, never crossing the center-line of the highway (R. 90, ll. 10-14). He first saw decedent from three-tenths to four-tenths of a mile up the highway and there was nothing abnormal in any way in the appearance of the auto decedent was driving (R. 89, ll. 11-15). It appeared to be driving in a straight line at all times as far as he could tell (R. 89, ll. 16-17). The truck driver was the only eye witness.

The evidence in this case is clear, and undisputed, and incontrovertible, that any alcohol in the blood stream of one who is deceased will not be dissipated but will remain there an indefinite period of time (R. 53, last 2 lines): Presumably until decomposition affects the body as a whole. This is in contrast to alcohol in the blood stream of a living person since that alcohol will be materially dissipated in a matter of a few hours (R. 76). The difference lies in whether the person is alive or dead. In the instant case the person involved was dead.

Prior to the commencement of the trial of the cause, petitioner filed his motion in limine to prevent the introduction of, or reference to, the taking of the blood sample and the test for its alcoholic content that followed, but the motion was overruled (R. 20-28). Petitioner's objections were reserved without the necessity for repeating them in front of the jury (R. 27, last 11 lines), but the matters objected to were permitted to go into evidence (R. 52). The jury returned its verdict for the Respondents (R. 91).

REASONS FOR GRANTING THE WRIT.

A.

THIS CASE, IF PERMITTED TO STAND, WOULD EFFECTIVELY OVERRULE JOHNSON v. UNITED STATES, 333 U.S. 10 (February, 1948). IT TOTALLY IGNORES THE PURPOSE OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IT RESULTS IN SERIOUS CONFLICT WITH SCHMERBER v. CALIFORNIA, 384 U.S. 757 (June, 1966) and UNITED STATES v. RABINOWITZ, 339 U.S. 56 (October, 1949), PREVIOUSLY DECIDED BY THIS COURT.

1. *Johnson* v. *United States,* 333 U.S. 10, holds specifically and clearly that:

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (334 U.S. at p. 14)

The reason is stated as follows:

> "The point of the Fourth Amendment . . . consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (334 U.S. at p. 14)

While the *Johnson* case recognized certain exceptions, and while *Schmerber* v. *California,* 384 U.S. 757, and *United States* v. *Rabinowitz,* 339 U.S. 56, illustrate two

of those exceptions, the exceptions are clearly defined and limited. The *Schmerber* case specifically states that the drawing of a blood sample from a person's body is a search and seizure such as is covered by the Fourth Amendment (384 U.S. at pp. 767 and 770). And it (*Schmerber*) held that it was not unreasonable for the police officer in that case to cause the blood sample to be taken because:

> "The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence', *Preston* v. *United States,* 376 U.S. 364 . . . We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system . . . Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." (384 U.S. at pp. 770 and 771)

But in the *Schmerber* case the person whose blood sample was taken was alive. The alcohol was being eliminated by the functioning of the body. In the instant case petitioner's decedent was dead. There was no functioning of his body. As the County Medical Director, a professional and licensed M.D. himself testified,

> "There is no dissipation of alcohol in the blood after a person dies." (R. 53, last two lines)

So the alcohol in a deceased person's blood remains there exactly as it does in the bottle into which the blood sample is placed. There was no emergency in the instant case. The evidence would have remained available until decomposition of decedent's body liberated it. The opportunity to obtain a search warrant was ample and no

circumstances appear which would have rendered the obtaining of a search warrant unnecessary. Where, then, is the justification for ignoring the provisions of the Fourth Amendment and its interpretation in the *Johnson* case? It is submitted that the search here was an unreasonable one because no search warrant was first obtained. To permit the decision below to become the law of the land would be an effective overruling of the *Johnson* case.

2. In *United States* v. *Rabinowitz, supra,* a search was held to be reasonable because it was an incident to a valid arrest. The Court of Appeals in the instant case, after noting that the testimony establishes that the quantity of alcohol in the blood of a deceased person is not diminished by elimination of alcohol through body functions as is the situation with a living person, states:

> "Upon this basis, plaintiff asserts that emergency steps relied upon in cases such as in *Schmerber* . . . are not here present as there is no danger that a reasonable delay to obtain a search warrant would affect the evidentiary value of the sample. The appropriate test is not whether it was reasonable to procure a search warrant but whether the search was reasonable under the existing circumstances. *United States* v. *Rabinowitz* . . ." (Appendix, *infra* pp. 8a-9a)

It is respectfully submitted that the language quoted from the *Rabinowitz* case by the Court of Appeals has no application here. There the search was made as an incident to a lawful arrest. A warrant for the arrest was first obtained, then the defendant was arrested, and then the search occurred. This Court held the search was reasonable. But the *Rabinowitz* case also held that:

> "Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest." (339 U.S. at p. 60)

And running through all the cases is the concept, well-expressed in the *Schmerber* case, as follows:

> ". . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." (384 U.S. at p. 768)

Here no reason whatsoever appears as a justification for the intrusion made in violation of the requirements contained in the Fourth Amendment.

B.

THIS CASE IS VIOLATIVE OF THE FOURTH AMENDMENT ON A SECOND CLEAR AND DISTINCT GROUND WHICH HAS NEVER BEFORE BEEN DECIDED IN THIS COURT. IF PERMITTED TO STAND, ITS SIGNIFICANCE WOULD BE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. THE ISSUE SHOULD BE DECIDED BY THIS COURT SO THE POINT IS SETTLED ONCE AND FOR ALL.

The cases of *Schmerber* v. *California, supra,* and *Breithaupt* v. *Abram,* 352 U.S. 432 and other blood sample cases decided by this Court, where no search warrant was obtained, all involved cases where samples of blood were taken at the request of a police officer, state patrolman, or similar law enforcement officers. The Iowa legislature called them "Peace Officers" and defined them, (321B.2—Appendix, *infra* p. 11a). Other decisions of this Court bearing on the question of who may decide whether the right of privacy under the Fourth Amendment must reasonably yield to the right of search are unanimously

in accord, it is believed, that a judicial officer, as a neutral and detached magistrate, should normally make the decision but that under carefully stated guidelines certain law enforcement officers, or peace officers, may make the determination. As this court in the *Rabinowitz* case, *supra,* stated:

> "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." (339 U.S. at p. 65)

But in the instant case, the blood sample in question was not taken at the request of any peace officer as defined by the statutes of Iowa, 321B.3 and 321B.4 (Appendix C, *infra* pp. 11a-12a) or by any law enforcement officer in any sense of the word. It was taken by the County Medical Examiner, at his own instance, for statistical purposes only. It was not done as a part of any autopsy for no autopsy was necessary and none was performed. For purposes of the search and seizure here involved, the blood sample was taken by a third party, an interloper who had no standing to take the blood sample from petitioner's decedent under any of the applicable decisions of this Court. To permit such a taking without a warrant and without the written (or oral) request of a law enforcement officer or peace officer would effectively muzzle the plain pronouncements of cases like the *Schmerber* case and the *Johnson* case. What would then be left of the Fourth Amendment? As this Court warned in the *Schmerber* case:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions." (384 U.S. at p. 772)

C.

THIS CASE IS IN CONFLICT WITH THE CASE OF ROCHIN v. CALIFORNIA, 342 U.S. 165 (January, 1952), AND OTHER APPLICABLE DECISIONS OF THIS COURT IN THAT SOCIETY'S SENSE OF FAIR PLAY AND DECENCY MUST BE VIOLENTLY OFFENDED BY WHAT OCCURRED IN THE TAKING OF THE BLOOD SAMPLE IN THE INSTANT CASE, YET THE EVIDENCE RESULTING THEREFROM WAS HELD ADMISSIBLE.

To draw a sample of blood from an individual's body is a serious matter, not to be minimized in any way because the invasion is a search for evidence of intoxication. Human decency and every man's sense of fair play requires that any blood so drawn be truly representative of the blood of the person from whom it was drawn. Dirty, contaminated needles would not be countenanced by the public. A contaminated sample does not necessarily produce a true or an accurate result. To use a contaminated sample on which to run a test is inherently offensive to any conscientious person's sense of decency and fair play. The only way to be sure a sample of blood is not contaminated by a dirty needle is to sterilize the needle so it is perfectly sanitary.

The Iowa legislature recognized the necessity for preventing contamination of any blood sample taken (321 B. 4). It there provides that:

> "Only new, originally factory wrapped, disposable syringes and needles, kept under strictly sanitary and sterile conditions shall be used for drawing blood." (Appendix, *infra* p. 12a)

In violation of this clear requirement, and plain language could hardly be more to the point, the County Medical Examiner used a needle which he had used before.

When he had finished using it he merely rinsed it in cold running water and put it back in his medical kit for use whenever he might need it again. He did not attempt to sterilize the needle. Neither did he attempt to sterilize his medical kit. Contamination of the blood sample was therefore almost a foregone conclusion. Whether or not the results were correct is not the key, but it is enlightening to know that under the 344 test which the blood sample in question produced, according to Respondents' expert witness, a pathologist, petitioners decedent would have a very serious muscle impairment. His arms, his legs, his torso, turning his head, and all those "would be very seriously impaired." Petitioner's decedent would be weaving around as he drove. He might momentarily go straight, but that would only be coincidental. By and large he would be weaving around. Moreover, this would be true of any person with a 344 test. Thus it would have been true of the deceased here.

Yet the evidence is clear from the Respondent truck driver, the only eye witness, that petitioner's decedent was not driving in the manner of one with a 344 test. The truck driver first saw the deceased when he was three-tenths to four-tenths of a mile up the highway. There was nothing abnormal about the way in which petitioner's decedent was driving. He never crossed the centerline of the highway and he appeared to be driving in a straight line at all times.

It therefore appears evident that the reasons for requiring a sterile needle, kept under strictly sanitary and sterile conditions, are sound and necessary and that there is a basis for the feeling of outrage that must accompany

the knowledge that a non-sanitary, non-sterilized needle was used in this case for a purpose so important and vital to the rights of our citizenry.

The case of *Rochin* v. *California,* 342 U.S. 165, January 1952, clearly holds that substances may not be removed from the body of an individual if by so doing a violation occurs of the constitutional guarantees of respect for personal immunities which

> ". . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental." (342 U.S. at p. 169)

With this concept in mind, this Court in the *Rochin* case further held that:

> ". . . we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocked the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of their constitutional differentiation." (342 U.S. at p. 172)

Under all the applicable decisions of this Court, it is submitted, the use of the non-sterile needle in this case constituted an unreasonable method of taking the blood sample and resulted in an unreasonable search and seizure.

The further language of the *Rochin* case is also enlightening:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'." (342 U.S. 173)

Further, whenever a violation of one's rights under the Fourth Amendment has occurred, it is implicit in that, and included as a part of the violation, that he has not been accorded due process of law under the Due Process clause of the Fourteenth Amendment.

CONCLUSION.

For the important reasons assigned, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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